Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

JACOBO XACUR, FELIPE XACUR, JOSÉ MARIA XACUR,

Petitioners,

v.

BANCO NACIONAL DE MEXICO S.A.; BANCOMER S.A.; BANCO MEXICANO S.A.; BANCA SERFIN S.A.; BANCO BILBAO VIZCAYA — MEXICO S.A.; CONFIA S.A.; BANCO INVERLAT S.A.; CALIFORNIA COMMERCE BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts erred as a matter of law in ordering and affirming involuntary relief under Chapter 7 of the Bankruptcy Code based on a conclusion that Mexican law renders an "aval" (accommodation guarantee) of an "avalista" (guarantor) non-contingent and due and payable as required by 11 U.S.C. § 303 despite the pendency of "suspension de pagos" proceedings on this issue in the Mexican courts?

2. Whether the lower courts erred as a matter of law in concluding that the Xacurs' debt is not subject to a bona fide dispute, thereby permitting the involuntary bankruptcies of three Mexican nationals in the United States, based on an erroneous interpretation of Texas law?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	1
A. Nature of the Case.	1
B. Course of Proceedings and Disposition in the Courts Below.	2
C. Statement of Facts.	3
1. Parties	3
2. Background of the Xacur Companies	4
3. Financings with Petitioning Creditors	5
4. Financial Difficulties and Remedial Efforts	5

Contents

Page

5. Mexican Suspension of Payments Proceedings 6

6. Petitioning Creditors Initiate Additional Legal Actions in Mexico 7

Reasons for Granting the Writ 7

A. The Fifth Circuit Erred in Concluding That the Xacurs' Debt Is Not Contingent and Is Currently Due and Payable. 8

B. The Fifth Circuit Erred in Concluding That the Xacurs' Debt Is Not Subject to a Bona Fide Dispute. 12

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454 (D.C. Cir. 1995) 11

Banco Nacional de Costa Rica v. Bremar Holdings Corp., 492 F. Supp. 364 (S.D. N.Y. 1980) 11, 12

B.D.W. Assoc., Inc., v. Busy Beaver Bldg. Centers, Inc., 865 F.2d 65 (3d Cir. 1989) 13

California v. Copus, 309 S.W.2d 227 (Tex. 1958), *cert. denied*, 356 U.S. 967 (1958) 15

F.R. Winkler KG v. Stroller, 839 F.2d 1002 (4th Cir. 1988) 11, 12

In re All Media Prop., 5 B.R. 126 (Bankr. S.D. Tex. 1980) 9

In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986) 13

In re Norris, 183 B.R. 437 (Bankr. W.D. La. 1995) 13

In re Sims, 994 F.2d 210 (5th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994) 13

Rayman v. Peoples Sav. Corp., 735 F. Supp. 842 (N.D. Ill. 1990) 11, 12

Cited Authorities

Page

Statutes:

11 U.S.C. § 303 ..... i, 1, 2, 8, 9, 11, 12, 13

28 U.S.C. § 158(a)(1) 2

28 U.S.C. § 1254(1) 1

Mexican Commercial Code Article 1097 .....9, 10, 11

Mexican Negotiable Instruments Law Article 116 ..... 9, 12

TEX. REV. CIV. STAT. ANN. art. 5069-1.06(2) (Vernon 1979) 13

Rule:

United States Supreme Court Rule 14(f) 1

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed March 8, 2000 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Texas, Houston Division Dated And Entered December 2, 1998 ..... 3a

Appendix C — Memorandum Opinion And Final Order Of The United States District Court For The Southern District Of Texas, Houston Division Dated And Entered October 22, 1998 ..... 5a

Appendix D — Order And Order For Relief Under Chapter 7 Of The United States Bankruptcy Court For The Southern District Of Texas, Houston Division Dated August 22, 1997 ..... 14a

Appendix E — Relevant Statutes 36a

Jacobo Xacur, Felipe Xacur, and José Maria Xacur (collectively the "Xacurs") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The March 8, 2000 opinion of the court of appeals (App. A) is not reported. The October 22, 1998 memorandum opinion and final order of the district court (App. C) are not reported. The order of the bankruptcy court (App. D) is not reported at 216 B.R. 187 (Bankr. S.D. Tex. 1997).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the issues of whether the Xacurs' debts are contingent and subject to a bona fide dispute under Section 303 of the Bankruptcy Code, 11 U.S.C. § 303. Pursuant to Rule 14(f) of the Supreme Court Rules the text of this provision is set forth in the appendix (App. E).

STATEMENT OF THE CASE

A. Nature of the Case.

This case involves involuntary Chapter 7 bankruptcy proceedings brought in Houston, Texas by eight Mexican banks ("Petitioning Creditors") against three Mexican nationals, the Xacurs, who guaranteed obligations of Mexican companies that are currently in the equivalent of

Chapter 11 bankruptcy proceedings in Mexico. The Petitioning Creditors' involuntary bankruptcy filing is deficient because the Mexican "pagares" (promissory notes) and "avals" (accommodation guarantees) that form the bases of the filing are contingent on the Mexican bankruptcy proceedings and subject to a bona fide dispute under Texas usury law. These deficiencies are in direct contravention of the requirements of 11 U.S.C. § 303. The lower courts' cursory treatment of these fundamental threshold issues and disregard of Mexican law is error as a matter of law.

B. Course of Proceedings and Disposition in the Courts Below.

This case arises under 11 U.S.C. § 303. On May 5-7, 1997 a trial was held in United States Bankruptcy Court for the Southern District of Texas, Houston Division to consider: (1) the respective involuntary petitions against the Xacurs; (2) the respective answers to the petitions filed by the Xacurs; (3) Jacobo Xacur's motion to dismiss for lack of jurisdiction; (4) the Xacurs' amended motion to dismiss or abstain; and (5) the Petitioning Creditors' response to these motions. Numerous witnesses testified, and over 300 exhibits were admitted into evidence.

On August 22, 1997, the bankruptcy court issued its Order and findings of facts and conclusions of law and declined to dismiss or abstain. *In re Xacur*, 216 B.R. 187 (Bankr. S.D. Tex. 1997) (App. D). On September 2, 1997, pursuant to 28 U.S.C. § 158(a)(1), the Xacurs filed a notice of appeal from the bankruptcy court's orders.

On October 22, 1998 the United States District Court for the Southern District of Texas, Houston Division entered

its Memorandum Opinion and Final Order affirming the bankruptcy court. (App. C). On November 2, 1998 the Xacurs filed Motions for Rehearing. On December 2, 1998 the district court denied the Xacurs' Motions for Rehearing. (App. B). On December 30, 1998 the Xacurs filed Notices of Appeal from the district court's orders.

On March 8, 2000 the United States Court of Appeals for the Fifth Circuit filed its Per Curiam Opinion affirming the district court's orders. (App. A).

C. Statement of Facts.

1. *Parties*

Jacobo Xacur, Felipe Xacur, and José Maria Xacur are Mexican nationals. Prior to the Petitioning Creditors' actions, Jacobo Xacur lived in Merida, Yucatan. José Maria Xacur and Felipe Xacur lived in Mexico City.

The Petitioning Creditors initiated the involuntary proceedings below against each of the Xacurs as follows:

a. **Jacobo Xacur**
   Banco Nacional de Mexico, S.A.
   Bancomer, S.A.
   Banco Mexicano, S.A.
   Banca Serfin, S.A.
   Banco Bilbao Vizcaya — Mexico S.A.
   Confia, S.A.
   Banco Inverlat, S.A.

bankruptcy under section 303 of the Bankruptcy Code. *See* 11 U.S.C. § 303 (1994) (App. E to Pet. at 36a-40a). Specifically, the Xacurs contend that, contrary to the requirements set forth in subdivision (b)(1) of Bankruptcy Code section 303, their debts are: (1) "contingent," and/or (2) subject to the "bona fide dispute" that they are usurious under Texas law. *Id.*

Mejorada testified that the Xacurs' debts are not contingent for any reason, and specifically that they did not become contingent merely because the Xacur Companies filed a suspension-of-payments proceeding. (Tr. 5/06/97, at 61-62-63, 65; *see also* PX 1.) Mejorada further testified that the Xacurs' debts are not subject to any bona fide dispute by virtue of usury laws. (*See* Tr. 05/06/97, at 45; *see also* PX 1.) Mejorada's uncontradicted testimony is that the notes are governed by Mexican law and that they are not usurious under Mexican law. (*See id.*)

The bankruptcy court found Mejorada's testimony to be persuasive on all issues. *See In re Xacur*, 216 BR at 194 (App. to Pet. at 29a-30a). The bankruptcy court rejected the Xacurs' "bona fide dispute" argument for an additional reason. The court found that the bankruptcy proceeding was proper because, for purposes of Bankruptcy Code section 303, a "sufficient" amount of the promissory notes are not usurious under either Texas or Mexican law. *Id.*

C. Correction of Misstatements in the Petition

Following this Court's admonition, the Banks "address any perceived mistatement made in the petition." SUP. CT. Rule 15.2.

The Xacurs refer to themselves as "Mexican nationals." (Pet. at 1.) They omit, however, to state that they moved to the United States and continued to default on their *avals* while residing in this country, before the Banks filed petitions for involuntary bankruptcy. (*See* Tr. 5/05/97, at 63-71, 155; PX 134, at No. 1; PX 139, at exhs. 3, 6, 7; PX 140 at Nos. 4, 8, 12; PX 144 at deposition exhs. 1-5; PX 145, at 464-69, 471, 510; PX 146, at exh. 4; PX 150, at deposition exh. 2, at pp. 6-11; PX 162-63; PX 170; PX 225; XX 69, at Tamaya Deposition, at pp. 50-51.) Also omitted from the petition is any acknowledgment that the Xacurs have completely defaulted on their loan guaranties. (*See* Tr. 5/05/97, at 36; PX 3; XX 2.)

The Xacurs are incorrect in asserting that any of the Banks have admitted the validity of any claim of usury. (*See* Pet. at 5, 14-15.) The Xacurs further err in claiming that the Banks allege the applicability of Texas law to the transactions and debts in question. (*See* Pet. at 13.) Instead, Mexican law governs the transactions, as the Banks have consistently maintained. *See* Appellees' Br. at 29-31.

The Xacurs erroneously claim in their petition that one Mexican district court has ordered the accumulation of the "individual lawsuits against the avalistas" to the Xacur Companies' suspension-of-payments proceeding. (*See* Pet. at 9 (emphases added).) In fact, however, that order pertained only to one suit by one of the Banks against only

one of the petitioners (*see* XX 36), as will be explained further below.[4]

Another erroneous claim in the Xacurs' petition is that the "Juez Concursal" (*i.e.*, the Mexican bankruptcy court) "has requested that all the civil actions involving the Xacur Companies and the Xacurs be incorporated into the Suspension of Payment Proceedings." Pet. at 7. Indeed, the Mexican bankruptcy court has indicated just the opposite in its only ruling on any of the *avals* in question – namely, its decision not to hear a suit on Felipe Xacur's *aval* on the ground that his *aval* is not part of the Xacur Companies' suspension-of-payments proceeding. (*See* PX 228.)

The Xacurs misquote the testimony of the Banks' expert witness, Mejorada, when they appear to attribute to him an admission about the supposed common "destiny" of the primary debtor and the *avalista*. (*See* Pet. at 9.) Mejorada made no such admission. He testified on cross-examination that one case had linked the "destiny" of the *avalista* with that of the primary debtor; but Mejorada then explained – as part of the same answer – that this one case was superseded by the later jurisprudence on which he relied in testifying that the *avals* are not contingent. (Tr. 5/06/97, at 61-62.)

Any other perceived misstatements of fact or law in the petition are addressed in the arguments that this brief advances for denying the writ requested by the Xacurs. *See* SUP CT. R. 15.2. As will be shown below, the Xacurs incorrectly contend that their debts are: (1) contingent under Mexican law; and (2) subject to any bona fide dispute under Texas usury law. Finally, the Xacurs utterly fail to articulate any "compelling reasons" for this Court to grant review. SUP. CT. R. 10.

4. *See infra* p. 10.

REASONS FOR DENYING THE WRIT

I.

THIS CASE INVOLVES ONLY THE APPLICATION OF SETTLED FEDERAL LAW TO INDIVIDUAL FACTS.

The Xacurs challenge rulings that are nothing more than the routine application of settled federal statutory law to the facts of this case. There is no dispute over the elements required for initiating an involuntary bankruptcy proceeding under 11 U.S.C. § 303 (App. E to Pet. at 36a-40a). Only two of those elements are even at issue here – that is, whether the Xacurs' debts are contingent and whether they are subject to a bona fide dispute.[5] The Xacurs cite no conflicts among federal courts over the meaning of those two elements, nor do they posit any need for this Court to settle any novel interpretative issues. *Cf.* SUP. CT. R. 10 (listing such conflicts and the need for settling important legal issues as examples of reasons warranting this Court's review).

A liability is contingent if "the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability." *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981). Promissory notes in default are not contingent. 2 COLLIER ON BANKRUPTCY § 303.03[2][a][I] (Lawrence P. King, ed., 15th ed. rev. 2000). Whether a claim is subject to a "bona fide dispute" depends

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5. The other requirements of 11 U.S.C. § 303 are not in dispute. *See In re Xacur*, No. H-97-3283 (S.D. Tex. Oct. 22, 1998) (App. C to Pet. at 10a).

on whether there is "an objective basis for either a factual or a legal dispute as to the validity of the debt." *Subway Equip. Leasing Corp. v. Sims* (*In re Sims*), 994 F.2d 210, 221 (5th Cir. 1993) (citations & quotation marks omitted). The Xacurs do not contest those legal propositions. (*See* Pet. at 9, 13.)

II.

THERE IS NO NEED FOR THIS COURT TO REVIEW THE BANKRUPTCY COURT'S FINDINGS, WHICH WERE PROPERLY AFFIRMED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The twin elements at issue in this case turn primarily on the nature of an *aval* under Mexican law and the applicability of Mexican law to a Mexican business transaction. Such issues do not warrant review by this Court. *See* SUP. CT. R. 10.

A. The Debts Are Not Contingent

The Xacurs argue that, under Mexican law, their avals are contingent because the underlying loans are the subject of a suspension-of-payments proceeding in Mexico, the Mexican equivalent to bankruptcy reorganization. (*See* Pet. at 8.) That suspension-of-payments proceeding, however, relates only to the Xacur Companies, not to the individual Xacurs. *See In re Xacur*, 216 B.R. at 195 (App. D to Pet. at 33a). There is ample evidence in the record that *avals* are not contingent under Mexican law – just as in this country a borrower's bankruptcy would not ordinarily affect a guarantor's duty to pay. *See, e.g.*, *Winters v. George Mason Bank*, 94 F.3d 130, 133 (4th Cir. 1996); *United States v.*

Wright, 57 F.3d 561, 562 (7th Cir. 1995); *Chugach Timber Corp. v. Northern Stevedoring & Handling Corp.* (*In re Chugach Forest Prods., Inc.*), 23 F.3d 241, 246 (9th Cir. 1994).

Article 114 of the Mexican Negotiable Instrument Law provides that one who executes an *aval* (*i.e.*, the *avalista*) has an obligation separate from the maker of the original note. (*See* PX-172, at 3 (App. to Resp. at 1a).) "The avalista becomes severally obligated with the person whose signature he has secured, and his obligation is valid even when the secured obligation is null for whatever reason." (*Id.* at 3.) Article 1989 of the Mexican Civil Code further provides that the creditors can look to all or any one of the joint debtors to pay the obligation. (*See* PX 172, at 8 (App. to Resp. at 1a).) "Each one of the creditors or all together may demand from all of the joint debtors (*deudores solidarios*), or from any of them, the total or partial payment of the debt." (*Id.*)

Contrary to the Xacurs' argument, an *avalista*'s independent and several obligation to pay is not altered by Article 116 of the Mexican Negotiable Instrument Law. According to Mejorada, the Banks' expert witness, Article 116 merely refers to such statutory conditions as the need for the passing of the maturity date and the absence of any limitations bar. (*See* Tr. 5/06/97, at 65; App. E to Pet. at 41a.) Further, as noted earlier,[6] the Xacurs distort the meaning and context of Mejorada's testimony about the "destiny" of the primary debtor and the *avalista*. (*See* Pet. at 9.) Mejorada merely admitted that a case had once referred to their common "destiny," adding that the case was superseded by the later jurisprudence on which Mejorada relied in giving his opinion that the *avals* are not contingent. (Tr. 5/06/97, at 61-62.)

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6. *See supra* p. 6.

Likewise, the Xacurs' obligations are unaffected by the other statute cited by the Xacurs – Article 1097 of the Mexican Commercial Code, which allows, but does not require, a Mexican bankruptcy court to "accumulat[e]" all claims into the suspension-of-payments proceeding. (App. E to Pet. at 40a.) Article 1097 does not even apply here, because it did not become effective until after the Xacurs executed their *avals*, as the Banks' expert witness, Mejorada explained. (*See* Tr. 5/06/97, at 17-18, 20; PX 3.)

Further, the Mexican bankruptcy court has recognized that the Banks' claims against the Xacurs on their *avals* are completely separate from the Xacurs Companies' suspension-of-payments proceeding. The Mexican bankruptcy court did so by refusing to hear a suit against Felipe Xacur on his *aval* on the ground that his *aval* is not within the suspension-of-payments proceeding. (*See* PX 228.)

It is, however, true that, in another proceeding filed by one of the Banks (Confia S.A.), another Mexican civil court did order that Confia's claims against the Xacur Companies and the Xacurs be accumulated into the suspension-of-payments proceeding. (*See* XX 36.) Nevertheless, the Banks' expert, Mejorada, testified that this one order of accumulation was erroneous and did not reflect Mexican law. (*See* Tr. 5/07/97, at 97.) The bankruptcy court below was entitled to accept Mejorada's testimony.

The courts below were likewise entitled to follow other federal cases that have found *avals* to be unconditional guarantees. *See A.I. Trade Fin. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1466 (D.C. Cir. 1995); *Fr. Winkler KG v. Stoller*, 839 F.2d 1002, 1009 (3rd Cir. 1988); *Rayman v.*

Peoples Sav. Corp., 735 F. Supp. 842, 850 (N.D. Ill. 1990); *Banco Nacional de Costa Rica v. Bremar Holdings Corp.*, 492 F. Supp. 364, 366 n.1 (S.D.N.Y. 1980). Although the Xacurs argue that any reliance on those cases is misplaced because they do not deal with a Mexican *aval* (*see* Pet. at 11), the conclusion reached in those cases has been confirmed by a more recent case that did discuss a Mexican *aval*. *Summers v. Guss* – a case not cited in the courts below – observed that a Mexican *aval* is in fact "unconditional." *Summers*, 7 F. Supp. 2d at 239 n.3 (*citing Banco Nacional de Costa Rica*, 492 F. Supp. at 366).

B. The Debts Are Not Subject to Dispute

The other issue before this Court – whether the notes are subject to a bona fide dispute – turns initially on the choice of governing law. The only dispute raised by the Xacurs is whether the promissory notes are usurious. According to the Banks' expert witness, Mejorada, the notes are governed by Mexican law and are not usurious in Mexico. (*See* Tr. 5/06/97, at 45.) That testimony is uncontradicted in the record.

The Xacurs appear to admit that Mexican law is controlling. In their petition before this Court, the Xacurs state that "Mexican law controls" the *avals*; and in their opening brief before the Fifth Circuit, the Xacurs similarly admitted that "**[a]ll of the events made the basis of the Xacurs [sic] relations with the [Banks] arise out of the parties' dealings in Mexico.**" (Pet. at 8; Appellants' Br. at 6 (emphasis in original).)

Further support for applying Mexican law is the Fifth Circuit's analogous decision in *Southwest Livestock & Trucking Co. v. Ramon*, 169 F.3d 317 (5th Cir. 1999). In that case, the Fifth Circuit refused to apply Texas usury law to invalidate a Mexican judgment based on a note executed in Mexico and governed by Mexican law. As the court of appeals observed, Texas public policy against usury aims to protect "necessitous" and "naïve" borrowers "within its boundaries" – concerns that were notably absent in that case. *Id.* at 323 (*quoting Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 753 n.13 (5th Cir. 1981)). Such concerns are absent here as well. Texas public policy simply does not apply to business transacted in Mexico by Mexican citizens, who later fled north to Texas, while their Mexican business ventures "went south." Thus, contrary to the Xacurs' argument, the courts below had no public-policy reason to disregard Mexican law. *See* Pet. at 15.

Even if Texas law applied to the Xacurs' transactions in Mexico, at least some of the notes, and the corresponding *avals*, would still be valid. Because certain of the notes in question failed to specify any rate of interest, Texas law – as well as Mexican law – supplies a non-usurious, statutory interest rate. *See In re Xacur*, 216 B.R. at 194 (App. to Pet. at 30a). Those notes, valid both under Texas and Mexican law, were specifically found by the bankruptcy court to be "sufficient" to authorize the Banks' involuntary bankruptcy proceeding. They are "sufficient" because their aggregate amount satisfies the $10,000 amount-in-controversy requirement for an involuntary bankruptcy proceeding. *See* 11 U.S.C. § 303(b)(1) (1994) (App. to Pet. at 36a).

C. The Lower Courts Properly Considered the Xacurs' Arguments

In their petition, the Xacurs chide the lower courts for making cursory determinations. (*See* Pet. at 2, 8, 12-13.) Specifically, the Xacurs complain that the lower courts gave "cursory treatment of . . . fundamental threshold issues" for an involuntary bankruptcy proceeding, "cursorily addressed" those threshold requirements, and reached "conclusions" that were "cursory" as well as "unsubstantiated." (*Id.*) Apparently, the Xacurs believe that this Court should grant review for that reason.

The Xacurs' complaint rings hollow, given that they themselves devoted only six pages of their opening brief before the Fifth Circuit to the threshold issues of contingency and bona fide dispute. Further, the Xacurs' complaint ignores that they received a full evidentiary hearing in the bankruptcy court, as well as an oral argument before the Fifth Circuit, which noted in its opinion that it had "carefully considered this appeal." (App. to Pet. at 2a.) Suffice it to say that the nature of the lower courts' decision making did not "so far depar[t] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." SUP. CT. R. 10(a).

CONCLUSION

This Court should deny the petition for writ of certiorari filed by Jacobo Xacur, Felipe Xacur and Jose Maria Xacur.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED MARCH 8, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20036

In The Matter Of: JACOBO XACUR,

Debtor.

FELIPE XACUR; JOSE MARIA XACUR;
JACOBO XACUR,

Appellants,

versus

BANCO NACIONALE DE MEXICO S A; BANCOMER S A; BANCO MEXICANO S A; BANCA SERFIN S A; BANCO BILBAO VIZCAYA-MEXICO S A; CONFIA S A; BANCO INVERLAT S A; CALIFORNIA COMMERCE BANK,

Appellees.

Appeal from the United States District Court
for the Southern District of Texas
Lower Court No. H-97-CV-3283

Appendix A

Before DAVIS, JONES and MAGILL* Circuit Judges.

PER CURIAM:**

The court has carefully considered this appeal in light of the oral arguments, briefs, and pertinent portions of the record. We are convinced that the district and bankruptcy courts did not clearly err in determining that the debts owed by the brothers were neither contingent nor subject to bona fide dispute. There was no reversible error in the exercise of personal jurisdiction over Jacobo Xacur, who lives, does business in and owns property in the United States and Southern District of Texas. This court lacks jurisdiction to consider the district court's denial of rehearing based on a request to abstain from hearing these cases pursuant to 11 U.S.C. § 305(c).

The judgment of the district and bankruptcy courts are therefore AFFIRMED.

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* Circuit Judge of the Eighth Circuit, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND ENTERED DECEMBER 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BR CASE NO. 96-48538-H5-7
BR CASE NO. 96-48540-H5-7
BR CASE NO. 96-48541-H5-7

CIVIL ACTION NO. H-97-3283

IN RE:

JACOBO XACUR
FELIPE XACUR
JOSE MARIA XACUR

Debtors-Appellants.

ORDER

These consolidated bankruptcy appeals are before the Court on Motions for Rehearing filed by the three debtors (Instruments No. 11, No. 12 and No. 13). The Court has carefully reviewed its prior decision, the motions for rehearing, and the Petitioning Creditors' opposition. Based on this review, the Court concludes that its prior decision affirming the United States Bankruptcy Court was correct.

Debtors' motions are based on a subsequent decision by the Bankruptcy Court in a case involving Debtors' brother,

Nicholas Xacur. In that case, the Bankruptcy Court found that "Nicholas Xacur no longer owns any interest in the corporations that either made or guaranteed the promissory notes to the petitioning creditors." *In re Xacur*, 219 B.R. 956, 968 (Bankr. S.D. Tex. 1998). The Bankruptcy Court also found that, "[i]n contrast to the three Xacur brothers, Nicholas Xacur's remaining corporate interests are distinct from those involved in the involuntary bankruptcies of the other Xacur brothers and the Mexican S.O.P. proceedings." *Id.* Based on these findings, the Bankruptcy Court concluded that it would not be fair and reasonable to exercise personal jurisdiction over Nicholas Xacur. The Bankruptcy Court's findings regarding Nicholas Xacur do not render the Bankruptcy Court's findings regarding the three Debtors in this case clearly erroneous. The Bankruptcy Court's conclusion regarding personal jurisdiction over Nicholas Xacur, based on facts which the Bankruptcy Court specifically noted were different from those involving Debtors in this case, does not alter the accuracy of the Bankruptcy Court's decision regarding these Debtors. Accordingly, it is hereby

ORDERED that Debtors' Motions for Rehearing (Instruments No. 11, No. 12 and No. 13) are **DENIED**.

SIGNED this 2 day of December, 1998, at Houston, Texas.

s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT
JUDGE

APPENDIX C — MEMORANDUM OPINION AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND ENTERED OCTOBER 22, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BR CASE NO. 96-48538-H5-7
BR CASE NO. 96-48540-H5-7
BR CASE NO. 96-48541-H5-7

CIVIL ACTION NO. H-97-3283

IN RE:

JACOBO XACUR
FELIPE XACUR
JOSE MARIA XACUR

Debtors-Appellants.

MEMORANDUM OPINION

This case is before the Court on appeal from the United States Bankruptcy Court for the Southern District of Texas. The Court has jurisdiction pursuant to 28 U.S.C. § 158. Appellants, Jacobo Xacur, Felipe Xacur, and Jose Maria Xacur, challenge the Bankruptcy Court's Order and Order for Relief entered August 22, 1997. Appellants argue that the Bankruptcy Court erred in declining to abstain based on principles of international comity, erred in declining to dismiss these involuntary cases pursuant to 11 U.S.C. § 305,

erred in entering the Orders for Relief, and erred in failing to enter judgment in favor of Appellants based on the Petitioning Creditors' bad faith.[1] Appellant Jacobo Xacur also argues that the Bankruptcy Court had no personal jurisdiction over him because he is a Mexican national not domiciled in the United States.

The parties have submitted thorough briefs, and the Court has reviewed the pleadings, the Bankruptcy Court record designated by the parties, and the applicable legal authorities. Based on this review, the Court concludes that the Bankruptcy Court's decisions to exercise personal jurisdiction over Jacobo Xacur, not to abstain based on comity, not to dismiss the involuntary cases under section 305, to enter Orders for Relief against each Appellant, and not to enter a judgment in favor of the Xacurs were all well-reasoned and correct.

The factual background of these jointly administered involuntary proceedings is fully set forth in the Bankruptcy Court's August 22, 1997 Order and will not be restated here except as necessary for the analysis of the issues on appeal.

I. *STANDARD OF REVIEW*

Conclusions of law made by the Bankruptcy Court are subject to *de novo* review by this Court, while the factual findings are reviewed under a "clearly erroneous" standard. *Matter of Walden*, 12 F.3d 445, 448 (5th Cir. 1994). This Court "may affirm if there are grounds in the record to

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1. Petitioning Creditors include seven Mexican banks and one California bank owned by a Mexican parent bank.

support the judgment, even if those grounds were not relied upon by the courts below." *Matter of Besing*, 981 F.2d 1488, 1494 (5th Cir.), *cert. denied*, 510 U.S. 821 (1993).

II. *ANALYSIS*

A. *Personal Jurisdiction over Jacobo Xacur*

The Bankruptcy Court found that, at the time of trial, Jacobo Xacur had lived in the United States, either in Houston or in Miami, since 1995. The Bankruptcy Court found that Jacobo Xacur receives mail at his residence in Houston, conducts business from his residence in Houston, owns property in the United States, and has a son who attended school in Houston from 1995 to 1996. These findings of fact are well supported by the evidence presented at trial.

As correctly noted by the Bankruptcy Court, an involuntary case may be filed against a foreign person who qualifies under section 109. *In re Axona International Credit & Commerce*, 88 B.R. 597, 606 (Bankr. S.D.N.Y. 1989), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990). A person qualifies as a debtor under section 109 if he "resides or has a domicile, place of business, or property in the United States." 11 U.S.C. § 109. The Bankruptcy Court's findings that Jacobo Xacur resides in Houston, conducts business from his home in Houston, and owns property in Houston establish that Jacobo Xacur properly qualifies as a debtor under section 109.

The Bankruptcy Court also concluded correctly that Jacobo Xacur's significant contacts with the United States,

specifically Houston, satisfy the minimum contacts requirements of due process. *See Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994) (relevant personal jurisdiction inquiry in cases involving statutes with provisions for nationwide service of process is "whether the defendant has had minimum contacts with the United States").

The Bankruptcy Court's findings of fact regarding personal jurisdiction over Jacobo Xacur are not clearly erroneous. Indeed, they are well-supported by evidence which is predominantly undisputed. The Bankruptcy Court's decision that its exercise of personal jurisdiction is permitted under both section 109 and under the due process clause is correct and is **affirmed**.

B. ***Abstention Based on International Comity***

The Bankruptcy Court's decision not to abstain on the basis of international comity was not an abuse of discretion. Federal courts are under a "virtually unflagging obligation" to exercise their jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1517, 1518 (5th Cir. 1994). Federal "courts regularly permit parallel proceedings in an American court and a foreign court" until such time as one court issues a judgment on the merits. *Turner*, 25 F.3d at 1521.

The Bankruptcy Court found that there exists no Mexican proceeding against the Xacurs which is comparable to the bankruptcy proceeding. The Bankruptcy Court also found

that abstention would not enhance the economical and expeditious administration of the Xacurs' estates. These findings are not clearly erroneous and provide an adequate basis for the Bankruptcy Court's decision not to abstain. Future enforcement difficulties which may be encountered by the Petitioning Creditors do not require abstention. The Bankruptcy Court's denial of Appellants' request for abstention based on international comity is **affirmed**.

C. *Dismissal Pursuant to 11 U.S.C. § 305*

Appellants also sought dismissal of these jointly administered involuntary cases based on 11 U.S.C. § 305. Section 305 permits, but does not require, dismissal if (1) the interests of the creditors and the debtors would be better served by dismissal, or (2) there is pending a foreign proceeding and certain factors set forth in section 304(c) favor dismissal. Section 305 dismissal is discretionary. *In re Business Information Co.*, 81 B.R. 382, 387 (Bankr. W.D. Pa. 1988). Section 305 dismissal does not involve a balancing of interests; the interests of both creditors and debtors must be better served by dismissal. *In re Eastman*, 188 B.R. 621, 624 (9th Cir. BAP 1995).

In this case, the Bankruptcy Court correctly found that the creditors' interests would not be better served by dismissal. The Bankruptcy Court also found that there was no comparable proceeding pending in Mexico. These findings are not clearly erroneous. Because the facts as found by the Bankruptcy Court do not satisfy the requirements for dismissal under section 305, the Bankruptcy Court properly exercised its discretion not to dismiss and the decision is **affirmed**.

Appendix C

D. *Orders for Relief*

Appellants argue that these jointly administered involuntary cases were improper under 11 U.S.C. § 303(b)(1)(4) because the debt is contingent and subject to a *bona fide* dispute. The parties do not dispute the remaining requirements for an involuntary petition under section 303 — that there are three or more creditors, that the creditors' claims aggregate more than $10,000, and that the alleged debtors are generally not paying their debts as they come due.

The Bankruptcy Court heard evidence on the contingent nature of Appellants' guarantees under Mexican law and concluded, consistent with other federal courts,[2] that the guarantees are not contingent because they resulted in joint and several liability on the part of the guarantors once the promissory notes' due dates passed. The Bankruptcy decision which is supported by expert witness testimony and by persuasive legal authorities, is **affirmed**.

The legal test in the Fifth Circuit for whether there exists a *bona fide* dispute regarding a debt is whether there is "an objective basis for either a factual or a legal dispute as to the validity of the debt." *In re Sims*, 994 F.2d 210, 221 (5th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994). The Bankruptcy

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2. *See A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1466 (D.C. Cir. 1995); *F.R. Winkler KG v. Stoller*, 839 F.2d 1002, 1009 (4th Cir. 1988); *Rayman v. Peoples Sav. Corp.*, 735 F. Supp. 842, 850 (N.D. Ill. 1990); *Banco Nacional de Costa Rica v. Bremar Holdings Corp.*, 492 F. Supp. 364, 366 n.1 (S.D.N.Y. 1980).

Court correctly rejected Appellants' argument that because the interest rates for some of the notes would be usurious under Texas law there existed a *bona fide* dispute. As found by the Bankruptcy Court, the notes are not usurious under Mexican law and, under Texas law, omitted interest rates are provided by statute at a non-usurious rate.

The Bankruptcy Court also correctly rejected Appellants' argument that forum selection clauses in the promissory notes limit proper venue for bankruptcy proceedings. Proper venue for bankruptcy proceedings is controlled by 28 U.S.C. § 1408, which provides for venue in the district in which the debtor resides. Additionally, as found by the Bankruptcy Court, not all of the promissory notes contained forum selection clauses. The Bankruptcy Court's conclusion that the involuntary cases were properly filed in the Southern District of Texas pursuant to section 303(b)(1) is **affirmed**.

E. *Failure to Enter Judgment against Petitioning Creditors*

Section 303(i) of the Bankruptcy Code permits the Bankruptcy Court, upon dismissal of an involuntary petition under section 303, to enter a judgment in favor of the debtor against petitioning creditors who have acted in bad faith. An involuntary petition is filed in bad faith only if "motivated by ill-will, malice or for the purpose of embarrassing or harassing the Debtors." *In re Sims*, 994 F.2d at 222. Additionally, an involuntary case is not filed in bad faith if the creditors "conduct a reasonable inquiry into the facts and the law prior to filing the petitions." *Id.* The Bankruptcy Court did not err in failing to enter judgment for Appellants

pursuant to section 303(i) because (1) the involuntary petition was not dismissed and (2) there is no evidence of bad faith.

III. *CONCLUSION*

The factual findings of the Bankruptcy Court are not clearly erroneous. Based on these factual findings, the Bankruptcy Court's conclusions of law, reviewed *de novo*, are correct. The reasoning and the decision of the Bankruptcy Court is adopted by this Court and supplements this Memorandum Opinion.

IT IS **ORDERED** that the Bankruptcy Court's Order and Order for Relief entered August 22, 1997, are **AFFIRMED** for the reasons stated herein and in the August 22 Order. A final order will be issued separately.

SIGNED this 22 day of October, 1998, at Houston, Texas.

s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BR CASE NO. 96-48538-H5-7
BR CASE NO. 96-48540-H5-7
BR CASE NO. 96-48541-H5-7

CIVIL ACTION NO. H-97-3283

IN RE:

JACOBO XACUR
FELIPE XACUR
JOSE MARIA XACUR

Debtors-Appellants.

FINAL ORDER

In accordance with the Memorandum Opinion issued this day, the Bankruptcy Court's Order and separate Order for Relief both entered August 22, 1997, are **AFFIRMED**.

THIS IS A FINAL ORDER.

SIGNED this 22 day of October, 1998, at Houston, Texas.

s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT
JUDGE

APPENDIX D — ORDER AND ORDER FOR RELIEF UNDER CHAPTER 7 OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AUGUST 22, 1997

In re Jacobo XACUR, Felipe Xacur, Jose Maria Xacur,

Alleged Debtors.

Bankruptcy Nos. 96-48538-H5-7, 96-48540-H5-7, 96-48541-H5-7.

United States Bankruptcy Court,
S.D. Texas,
Houston Division.

Aug. 22, 1997.

* * *

ORDER

KAREN KENNEDY BROWN, Bankruptcy Judge.

This is an involuntary Chapter 7 bankruptcy filed under 11 U.S.C. § 303 in which the petitioning creditors, seven Mexican banks and one California bank owned by a Mexican parent bank, seek an order for relief against three Mexican citizens, Jacobo Xacur, Jose Maria Xacur, and Felipe Xacur. In addition to jurisdictional issues, the alleged debtors urge that this Court should abstain from this case because of pending litigation in Mexico between the same parties. Alternatively, the Xacurs raise counter-claims alleging usury, seeking to nullify the banks' claims. A hearing was conducted

on the involuntary petition and the alleged debtors' motion to dismiss and for abstention. After considering the evidence and law, the Court concludes that it should not abstain and should enter an order for relief as to these three debtors.

I. Facts

The petitioning creditors are: (1) Banco Nacional de Mexico, S.A., a member of Grupo Financiero Banamex – Accival ("Banamex, S.A."), (2) Bancomer, S.A., Institucion de Banca Multiple Grupo Financiero ("Bancomer, S.A."), (3) Banco Mexicano, S.A., Institucion de Banca Multiple Grupo Financiero Invermexico ("Banco Mexicano, S.A."), (4) Banca Serfin, S.A., Institucion de Banca Multiple Grupo Financiero Serfin ("Banca Serfin, S.A."), (5) Banco Bilbao Vizcaya-Mexico, S.A., Institucion de Banca Multiple Grupo Financiero Banco Bilbao Vizcaya-Probursa, formerly Multibanco Mercantil Probursa, S.A., formerly known as Institucion de Banca Multiple Grupo Financiero Probursa ("Banco Bilbao Vizcaya-Mexico, S.A."), (6) Confia, S.A., Institucion de Banca Multiple Abaco Grupo Financiero ("Confia, S.A."), and (7) Banco Inverlat, S.A., Institucion de Banca Multiple Grupo Financiero Inverlat ("Banco Inverlat, S.A."), and (8) California Commerce Bank, (Petitioners).

From 1992 through 1994, petitioners loaned over $240,000,000 to the Xacur companies known as: (1) Hidrogenadora Yucateca, S.A. de C.V., (2) Oleoproteinas del Sureste, S.A. de C.V., (3) Aceitera del Golfo, S.A. de C.V., (4) Harinas del Sureste, S.A. de C.V., (5) Grupo Xacur, S.A. de C.V., (6) Detergentes y Jabones Sasil, S.A.

de C.V., (7) Hidrogenadora Nacional, S.A. de C.V., (8) Licuoenvases, S.A. de C.V., (9) Promotora Hinsa, S.A. de C.V., and (10) Proteinas y Aceites del Bajio, S.A. de C.V. (See Appendix A). All of the promissory notes were to be repaid in American dollars. Many of the promissory notes are secured by the assets of the Xacur companies located in different states of Mexico.

Some of the Xacur companies were founded in 1949 and some in 1953. While two of the Xacur companies are in the soap and plastic container business, most are in the business of grain and cooking oil processing, marketing, and distribution on a retail and wholesale level throughout Mexico. They have plants located in Merida, Guanajuato, Mexicali, and Nuevo Laredo areas of Mexico. Throughout Mexico, the companies employ 2,000 employees directly and another 3,000 employees indirectly by subsidiaries.

In addition to the corporate security given for the notes, each Xacur brother gave his "aval." Under Mexican law, an aval is a form of financial obligation similar to that of a comaker or co-obligor under United States law. One gives an aval by endorsing a promissory note known as a "pagare" and one who gives his aval through endorsement of a promissory note is known as an "avalista."

A. Banamex Loans

September 25, 1995 and September 21, 1995, Banamex, S.A. sued Jacobo Xacur in courts located in Yucatan Merida on his avals in two cases, alleging sums due of $4.9 million and $53 million U.S. dollars. Many of the promissory notes

have the interest rate omitted. Other notes at issue recite a specific interest rate. Whether the interest is stated or omitted, many notes require interest plus penalty interest on default. Specifically, the Banamex promissory notes require interest plus penalty interest ("moratoria") on any overdue principal amount payable at a variable rate known as the Libor Rate calculated from the date of default multiplied by 4.[1]

Most of the notes are written in English and Spanish. In addition, many of the Banamex notes at issue have a clause reciting the parties' agreement in English that:

> Any legal action or proceeding arising out of or relating to this Promissory Note may be brought in the Courts of the State of New York, United States of America or of the United States of America suppletory for the State of New York, or of the Federal District, Mexico, at the election of the Holder hereof thereby waiving the jurisdiction of any other Courts.
>
> This Promissory Note shall be governed by and construed in accordance with the laws of the State of New York, United States of America, provided, however, that if, and only if, any legal action or proceeding is brought by the Holder in respect of this Promissory Note in the Courts of Mexico,

1. The Libor Rate is defined as the annual rate of interest equal to the arithmetic average of the rate at which deposits of Eurodollars are offered in the London Interbank Market among various specified banks as of two business days prior to the issuance date of the Promissory Note as shown on the Reuters Screen Libor Page.

> this Promissory Note shall be deemed to be an instrument made under the laws of Mexico and shall be governed by, and construed in accordance with the laws of Mexico, and provided further that the obligation of "The Undersigned" to repay this Promissory Note together with accrued interest thereon, and all other amounts payable hereunder shall be dischargeable only by payment in dollars at New York, N.Y., U.S.A.

(Alleged Debtors' Ex. 38 — Banamex note p. 4)

B. Bancomer, S.A.

Some of the Bancomer notes have the interest rate left blank; some have a stated rate of interest ranging up to 12.02%. The penalty rate on some notes is 15%. The notes do not state a choice of law or forum.

C. Banco Mexicano, S.A.

The Banco Mexicano notes have interest rates not exceeding 12.25%. The notes do not state a choice of law or forum.

D. Banca Serfin, S.A.

The Banca Serfin notes state interest rates not exceeding 10% plus a penalty rate of 50%. The Banca Serfin notes state:

> For everything related to the interpretation of compliance with, or judicial request for, payment

> of the obligations herein undertaken, the Maker expressly submits to the jurisdiction of the competent courts in the City of Mexico Federal District, United Mexican States, or in the _____ at the election of the holder hereof there by waiving the jurisdiction of any other domicile. In the event of suit to enforce payment of the principal amount hereof and accrued interest, if any, the Borrower agrees to pay such additional sum for expenses and attorney fees as the court may judge reasonable.

E. Banco Bilbao Vizcaya-Mexico, S.A.

The notes due Banco Bilboa Vizcaya state interest rates not exceeding 9.5% with penalty rates ranging up to 19%.

F. Confia, S.A.

The Confia notes state rates of interest ranging up to 16% plus a penalty rate of 50%. The Confia notes state:

> The SUBSCRIBER and the GUARANTOR hereby irrevocably submit to the jurisdiction of any New York State court or any United States court sitting in New York City, New York, United States or any competent court of Mexico City, Mexico or of the city of MEXICO D.F., Mexico, in any action or proceeding arising out of or relating to this PROMISSORY NOTE, as the plaintiff in such action or proceeding may elect and the SUBSCRIBER and the GUARANTOR

hereby irrevocably agree that all claims in respect of such action or proceeding may be heard and determined in any of such courts. The SUBSCRIBER and the GUARANTOR irrevocably waive, to the fullest extent permitted by law, any objection which it may now or hereafter have to laying of venue of any suit, action or proceeding with respect to this PROMISSORY NOTE brought in any court aforementioned, and the SUBSCRIBER and the GUARANTOR further irrevocably waive any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient [sic] forum. The SUBSCRIBER and the GUARANTOR hereby expressly waive all rights to any other jurisdiction, wich [sic] they may now or hereafter have any reason of their present or subsequent domiciles.

G. Banco Inverlat, S.A.

The notes due Inverlat show interest rates ranging up to 9.9%. The notes state:

The Maker and, as the case may be, the guarantor(s) agree that they can be judicially required to pay this PROMISSORY NOTE in the city of Mexico, D.F. Mexico, in the event that the Maker does not liquidate this PROMISSORY NOTE at maturity. The Maker and, as the case may be, the guarantor(s) expressly submit to the courts of Mexico, D.F. Mexico, or of the United

Appendix D

States of America for the State of _____ or of the State of _____ or all at the election of the holder of this PROMISSORY NOTE, waiving the jurisdiction of any other domicile which in the future they may have.

H. California Commerce Bank

The note due California commerce states an interest rate of prime plus 2% and a penalty rate of 6%. This note states:

The undersigned consent(s) and agree(s) that the holder hereof shall be able to bring any suit, action or proceeding with respect to this Promissory Note, at the election of the holder hereof, in the United States of America or in the United Mexican States. For everything related to the interpretation of, compliance with, or judicial request for payment of the obligations herein undertaken, in the United States of America, the undersigned hereby irrevocably and expressly submit(s) at the election of the holder hereof, to the jurisdiction, indistinctly, of (I) the competent courts of the State of California, located in the City of Los Angeles, California, therefore expressly waiving any other jurisdiction they (it) may be entitled to by reason of their (its) present or future domicile. For everything related to the interpretation of, compliance with, or judicial request for payment of the obligations herein undertaken, in the United Mexican States, the undersigned hereby irrevocably and expressly

submit(s) to the jurisdiction of the competent courts of the City of Mexico, Federal District, United Mexican States, therefore expressly waiving any other jurisdiction they (it) may be entitled to by reason of their (its) present or future domicile. In the event a suit is brought to enforce payment of this Promissory Note, the undersigned agree(s) * Divided by .951, initial rate of 11.57% per annum to pay all expenses and attorney fees incurred by the Bank in such suit. . . .

This Promissory Note shall be governed by, and construed in accordance with, the laws of the State of California, United States of America; provided, however, that if, and only if, any legal action or proceeding (other than an action to enforce a judgment obtained outside the United Mexican States) is brought by the holder hereof in the courts of the United Mexican States or any political subdivision thereof, this Promissory Note, for such purpose only, shall be governed by, and construed in accordance with, the laws applicable in the City of Mexico, Federal District, United Mexican States.

Most of the loans were made to fund the operation of the Xacur companies, including funding grain shipments from the United States to Mexico. Additionally, the Xaeur brothers borrowed substantial sums from the banks to fund the construction of a major soybean oil preparation and extraction plant to be built in Merida. The Xacur brothers allege that once built, the processing plant system was

defective and for that reason they were unable to repay these specific loans. This soybean plant is the subject of pending litigation in Case No. C-3-93-278 in the United States District Court for the Southern District of Ohio (Western Division) between Oleoproteinas Del Sureste, S.A., et. al (the Xacur companies) and The French Oil Mill Machinery Co., an Ohio corporation, et. al (the plant manufacturer).

From 1990 to September 1994, the Xacurs paid over $28 million American dollars on the notes. Thereafter, in October 1994, there was a default on some of the Banamex loans. In addition, the Mexican government devalued the peso from 3.1070 in 1993 to 4.9400 in December 1994, increasing the total principal owed on the debt by approximately 53% in one stroke. The Xacurs and their companies made no further payments on these notes. However, several of the banks have set off a total of 148,000,000.00 pesos of the Xacurs' personal and corporate funds as involuntary credits against the debts. The Xacurs contend that these set offs violated Mexican law.

Between February 1995 and 1996, the banks filed at least 27 lawsuits against the Xacur companies and against the Xacur brothers, individually, to collect on the notes and the avals. See Appendix B. These suits were filed in various civil courts in different regions of Mexico. No judgments have been obtained to date.

On June 28, 1995, ten Xacur companies filed what is known as a "suspension de pagos" or Suspension of Payments (SOP). This is a form of reorganization proceeding under Mexican law which allows the entity filing the SOP

to join pending related litigation in the SOP court. On July 3, 1995, the ten Xacur companies were authorized to go forward in one SOP proceeding by the Mexican judge. Some of the banks appealed this ruling seeking to have the case converted to a liquidation proceeding. To date, these appeals have been unsuccessful and/or the banks have agreed to an abatement of the appeal in order to negotiate with the Xacurs.

The SOP proceeding is ongoing in Mexico.[2] Only one of the pending civil cases brought by the banks on the avals against the Xacurs individually have been "accumulated" to the SOP; that is, it has been joined for consideration by the SOP judge. The Xacur companies seek to have all cases joined in the SOP proceeding. The banks have resisted that joinder. The parties dispute whether such joinder is required under Mexican law. Nevertheless, all banks have filed claims in the SOP proceeding against the Xacur companies arising from the notes. To date, all other civil cases against the Xacur brothers individually, alleging default on their avals remain pending before the various civil courts of Mexico.

In response to each action taken by the banks in the Mexican civil proceedings, the Xacurs have employed counsel and disputed each legal action before the Mexican courts. The Xacur companies continue to operate in Mexico.

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2. At one point criminal charges were brought against the judge who granted the SOP, Jacobo Xacur, and counsel for Jacobo Xacur, but on appeal these cases were dismissed. It appears that the irregularities on which the indictment were brought included improper joinder of all the bankruptcy cases and non-listed assets and liabilities. These criminal proceedings are now dismissed and there are no pending criminal proceedings against the Xacurs or the Xacur companies.

The Xacurs contend that they moved their residences from Mexico after the banks made attempts to proceed criminally against them for causes of action derived from the nonpayment of these notes. There are no criminal proceedings pending against them in Mexico at present. The banks claim that the Xacurs' change in residence has impaired the banks' abilities to litigate their cases against the Xacurs individually in Mexico.

The banks continued to negotiate with the Xacurs in 1995 and 1996. On September 18, 1996, the banks filed this involuntary petition against the Xacur brothers.[3]

II. Issues Presented

Petitioners claim that: (1) each of the alleged debtors is indebted to three or more of the petitioners for an amount aggregating in excess of $10,000.00; (2) this debt is liquidated and non-contingent, and is not subject to a bona fide dispute; (3) the alleged debtors are not paying their debts as they become due; (4) the alleged debtors are qualified debtors under the Bankruptcy Code; (5) this Court has jurisdiction to preside over a bankruptcy case brought against each of the alleged debtors; and (6) this Court should not abstain from hearing these cases.

Alleged debtors Jacobo Xacur, Jose Maria Xacur, and Felipe Xacur claim that the Court should abstain from hearing this case on the grounds that: (1) abstention would be in the

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3. The case of Nicholas Xacur, case no. 96-48539-H5-7, has not been jointly administered with the cases of the other Xacurs.

best interest of the petitioners and the alleged debtors, (2) abstention would prevent the continuation of a disruptive involuntary bankruptcy case, (3) the traditional 5-part test for abstention from involuntary bankruptcy proceedings is satisfied by the facts of this case, and (4) abstention would be in the interest of international comity.

In addition, alleged debtors urge that at least as to some banks, the promissory notes include forum selection clauses that should bar the bringing of this involuntary in the Southern District of Texas. The Court finds, however, that while Banamex loans may arguably raise an issue of forum selection, nothing in their promissory notes prevents the remaining banks from initiating these involuntary cases in the Southern District of Texas.

More importantly, the alleged debtors urge that petitioners have subjected themselves to Texas usury law by filing this bankruptcy petition in the Southern District of Texas. Alleged debtors contend that as a matter of public policy, this Court should not grant an order of relief to enforce the notes at issue because many of the notes are usurious on their face, violating the public policy and laws of the state of Texas. If the Court enters an order for relief, the alleged debtors assert counterclaims of usury under Texas law in order to nullify the banks' claims.

In addition, alleged debtor Jacobo Xacur moves for dismissal under Fed.Rules Civ.Proc.Rule 12(b)(2), urging that this Court cannot exercise personal jurisdiction over him because he is a Mexican national, is not domiciled in Texas,

and has insufficient contacts with Texas to confer such jurisdiction.[4]

III. Jurisdiction

Does this Court have jurisdiction over Jacobo Xacur?[5] The banks assert that while they have met the minimum contacts test, they need not do so if the debtor meets the requirements of 11 U.S.C. § 109 which provides: "(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, . . . may be a debtor under this title."

A foreign debtor may file a voluntary bankruptcy petition in the United States under 11 U.S.C. § 301 so long as the debtor is a person, not an excepted entity. Similarly, an involuntary case may be filed against a foreign person who qualifies under Section 109. In re Axona International Credit & Commerce, 88 B.R. 597, 606 (Bankr.S.D.N.Y.1988).

Jacobo Xacur is a Mexican national who asserts that there is no showing of minimum contacts between himself and the United States. Nevertheless, petitioning creditors urge that Jacobo left Mexico in 1995 and has lived in the United States in either Miami or Houston ever since. The

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4. Jacobo Xacur previously asserted that he had never been served with the involuntary petition. However, he now waives that issue.

5. Jose Maria and Felipe Xacur do not contest personal jurisdiction.

Court finds that El Khoura Corp., a company of which Jacobo Xacur is president and shareholder, owns a condominium in Houston[6] from which many telephone calls are made to the Xacur businesses in Mexico. Additionally, the property appears to be a residence at which Jacobo Xacur receives mail and Jacobo Xacur's son attended school in Houston from 1995 to 1996. This Court concludes that Jacobo Xacur is conducting business from his condominium in Houston.

Jacobo Xacur refused to appear for his deposition and did not testify before this Court. The Court finds that Jacobo Xacur resides in Houston and owns property here. The Court finds that he is eligible to be a debtor under Section 109. Flics and Ireland, Bankruptcy and the Problems of Multi-Jurisdictional Workouts, 553 PLI/Comm 175, 195 (1990).

In addition to the property requirement of § 109, the Court finds that minimum contacts have been established. "When a federal court is attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States." Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1258 (5th Cir.1994). The Court finds that the minimum contacts test is satisfied in view of evidence of Jacobo Xacur's residence and property ownership in Houston. Traditional notions of fair play and substantial justice are not offended by this Court's exercise

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6. Jacobo Xacur's ownership interest in the condominium was assigned to El Khoura Corp. The purchase money loans on the condominium were borrowed by Jacobo Xacur. Jacobo Xacur is listed as owner with the home owners association.

of jurisdiction over alleged debtor, Jacobo Xacur, and due process is met.

IV. Section 303 Requirements

To prove an involuntary case, plaintiffs must show by a preponderance of the evidence that there are three or more creditors holding claims that are "not contingent as to liability or the subject of a bona fide dispute . . ." 11 U.S.C. § 303(b)(1). If the involuntary petition is contested as here, then following a hearing, the Court shall enter the order for relief on a finding that the debtor is not paying its debts as they come due unless the debts are the subject of a bona fide dispute. 11 U.S.C. § 303(h). Regarding the requirements of Section 303(b) and (h), the Xacurs challenge only whether the avals are contingent debts under Mexican law and whether there exists a bona fide dispute arising from their usury defense.

This Court finds under Mexican law, the banks may proceed against the Xacurs individually on their avals without joining their cases in the SOP. See Article 1097 of the Mexican Commercial Code. This Court credits the testimony of Petitioning Creditors' expert witness, Lic. Sanchez-Mejorada-Velasco that under Mexican law, these petitioning banks are not required to wait for the resolution of their claims or cases against the corporate obligors on the notes prior to enforcing the avals against the avalistas.

V. Usury

The Xacurs contend that the debts to the petitioning creditors are the subject of a bona fide dispute alleging that

the notes at issue are usurious. The Court finds that while some of the loans of Banamex and other banks might exceed the permissible rate of interest under Texas law,[7] the notes are not usurious under Mexican law and sufficient notes are not usurious under Texas law to satisfy the requirements of section 303. In particular, the Court concludes that where the interest rate of the note is blank, Mexican law provides statutory rate of 6% and no moratoria rate could be collected. Under Texas law, the omitted rate is by statute the judgment rate of 6% with regards to the promissory notes at issue here. Tex.Rev.Stat.Ann. art. 5069-1.03; Tex.Bus. & Comm.Code § 3.112. Even excluding any arguably usurious debts, the Court finds that the debts owed to the petitioning creditors satisfy the requirements of 11 U.S.C. § 303.

VI. Abstention

The Xacurs argue that 11 U.S.C. § 305 requires abstention. 11 U.S.C. § 305 provides:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if —
>
> > (1) the interests of the creditors and the debtor would be better served by such dismissal or suspension; or

---

7. Because there was no proof by the parties of the exact Libor rate on any one date, there is no specific determination of this issue.

(2)(A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

11 U.S.C. § 304(c) provides:

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with —

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claims holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title [11 U.S.C. §§ 101 et seq.];

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

The Court is not persuaded that the interests of the creditors and alleged debtors would be better served by dismissal or abstention. Although advantages might accrue to the alleged debtors should this Court abstain, the test under 11 U.S.C. § 305(a)(1) is not a balancing test. This Court must find that the interests of the creditors would be better served by abstention and this has not been shown. See In re Eastman, 188 B.R. 621, 624 (9th Cir. BAP 1995) ("The courts that have construed § 305(a)(1) are in general agreement that abstention in a properly filed bankruptcy case is an extraordinary remedy, and that dismissal is appropriate under § 305(a)(1) only in the situation where the court finds that both 'creditors and the debtor' would be 'better served' by dismissal.") By transferring their residences from Mexico, the Xacurs have stymied any further activity in the individual civil proceedings against the Xacurs pending in Mexico on the avals.

The petitioning creditors urge that abstention is inappropriate under section 305(a)(2)(a) because there is no foreign proceeding pending against these alleged debtors. They contend that this Court cannot and/or should not abstain in favor of the numerous individual civil proceedings pending in Mexico.

Appendix D

A foreign proceeding under the Bankruptcy Code is a "proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization." 11 U.S.C. § 101(23). The suspension of payments currently pending in Mexico for the Xacur companies may qualify as a foreign proceeding for the Xacur companies but not for these alleged individual debtors. That proceeding will not effect a reorganization or liquidation of the assets and debts of these alleged debtors. Since there is no foreign proceeding to which to defer under 11 U.S.C. § 305, the factors under 11 U.S.C. § 304 are irrelevant.

Even if the suspension of payments proceeding for the Xacur companies qualifies as a foreign proceeding for these alleged debtors, the Court finds that an economical and expeditious administration of the alleged debtors' estates will not be enhanced by deference to that foreign proceeding. The only statutory factor raised by the alleged debtors in support of abstention under section 304(c) is comity. The Court finds that the interests of comity do not support abstention in this case. "International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction." In re Maxwell Communication Corp., 93 F.3d 1036, 1049 (2nd Cir.1996). No conflict has been shown in the instant matter.[8] There is

8. Alleged debtors urge that Articles 605 and 606 of the Federal District Civil Code of Mexico indicate that Mexican courts could not recognize final decisions of this Court due to the pending

no inconsistency in maintaining both individual and corporate bankruptcy proceedings for the Xacurs and their companies. No Mexican court has enjoined bankruptcy or collection proceedings against these alleged debtors. The litigation currently pending against these alleged debtors in Mexico is not in the nature of reorganization or liquidation proceedings.

Based on the foregoing, the Court finds that abstention is not appropriate in these involuntary proceedings. The Court finds that the alleged debtors may be debtors under 11 U.S.C. § 109. The Court finds that petitioning creditors have met their burden of proof under 11 U.S.C. § 303. A separate order for relief shall be entered.

Appendix D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

CASE NO. 96-48538-H5-7
CASE NO. 96-48540-H5-7
Bankruptcy Case No. 96-48541-H5-7

JOINTLY ADMINISTERED UNDER
CASE NO. 96-48538-H5-7

In re

JACOBO XACUR
FELIPE XACUR
JOSE MARIA XACUR

* * *

ORDER FOR RELIEF UNDER CHAPTER 7

On consideration of the petition filed on September 18, 1996 against the above-named debtor, an order for relief under chapter 7 of the Bankruptcy Code (title 11 of the United States Code) is granted.

Aug. 22, 1997
Date

s/ Karen Kennedy Brown
Bankruptcy Judge

APPENDIX E — RELEVANT STATUTES

11 U.S.C. § 303

§ 303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title —

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $10,775* more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,775* of such claims;

---

* [*Editor's Note:* For cases commenced prior to April 1, 1998, the dollar amount is $10,000.]

(3) if such person is a partnership —

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if —

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment —

(1) against the petitioners and in favor of the debtor for —

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for —

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section —

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

* * *

Article 1097 of the Mexican Commercial Code

Article 1097 A judge who hears bankruptcy and receivership actions is competent to hear all claims against the debtor, including those against other codefendants as co-obligors, guarantors, or where they have been sued for any grounds involving proprietary obligations, either in mercantile or civil actions, in order that they may be accumulated in the insolvency proceeding and the claimants may assert their rights in this action.

Excepted from the foregoing shall be those actions of mortgage or pledge foreclosure or those wherein a final judgment after trial has been duly entered and notified.

Appendix E

Article 116 of Mexican Negotiable Instruments Law

Article 116. — The action against the avalista will be subject to the same terms and conditions to which the action against the avalado is subject.

* * * *

Supreme Court, U.S.
FILED
JUL 07 2000
CLERK

(2)

No. 99-1969

IN THE

Supreme Court of the United States

JACOBO XACUR, FELIPE XACUR, and JOSE MARIA XACUR,

Petitioners,

v.

BANCO NACIONAL DE MEXICO, S.A.; BANCOMER, S.A.; BANCO MEXICANO, S.A.; BANCA SERFIN, S.A.; BANCO BILBAO VIZCAYA – MEXICO, S.A.; CONFIA, S.A.; BANCO INVERLAT, S.A., and CALIFORNIA COMMERCE BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6, Respondents identify all of their parent corporations, and Respondents represent that there are no publicly held companies that own 10 percent or more of the Respondents' stock

The parent company of Banco Nacional de Mexico, S.A. ("Banamex") is Grupo Financiero Banamex Accival, S.A. de C.V.

The parent company of Bancomer, S.A. is Grupo Financiero Bancomer, S.A. de C.V.

The parent company of Banco Mexicano, S.A. is Grupo Financiero Santander Mexicano, S.A. de C.V.

The parent company of Banca Serfin, S.A., is Grupo Financiero Serfin Santander Mexicano, S.A. de C.V.

The parent company of Banco Bilbao Vizcaya-Mexico, S.A. is Grupo Financiero BBV - Probursa, S.A. de C.V.

The parent company of Confia, S.A. is Grupo Financiero Citibank, S.A. de C.V.

The parent company of Banco Inverlat, S.A. de C.V. is Grupo Financiero Inverlat, S.A. de C.V. (The Bank of Nova Scotia owns 10 percent of Grupo Financiero Inverlat, S.A. de C.V.)

The parent company of California Commerce Bank, a California bank, is its Mexican parent, Banamex USA Bancorp.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below	1
B. Statement of Facts	2
C. Correction of Misstatements in the Petition	5
Reasons for Denying the Writ	7
I. This Case Involves Only The Application Of Settled Federal Law To Individual Facts.	7
II. There Is No Need For This Court To Review The Bankruptcy Court's Findings, Which Were Properly Affirmed By The District Court And The Court Of Appeals.	8
A. The Debts Are Not Contingent	8
B. The Debts Are Not Subject to Dispute	11

Contents

	Page
C. The Lower Courts Properly Considered the Xacurs' Arguments	13
Conclusion	14
Appendix — Relevant Statutes	1a

TABLE OF CITED AUTHORITIES

Page

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A.I. Trade Fin. v. Petra Int'l Banking Corp., 62 F.3d 1454 (D.C. Cir. 1995) 10

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Page

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11 U.S.C. § 303 ..... 2, 4, 7

11 U.S.C. § 303(b)(1) 12

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Mexican Commercial Code, Article 1097 10

Mexican Negotiable Instrument Law, Article 114 ... 9

Mexican Negotiable Instrument Law, Article 116 ... 9

Cited Authorities

Page

Rules:

SUP. CT. R. 10 ..... 6, 7, 8

SUP. CT. R. 10(a) 13

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Other Authority:

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This brief in opposition is being filed jointly by all of the respondents: Banco Nacional de Mexico, S.A.; Bancomer, S.A.; Banco Mexicano, S.A.; Banca Serfin, S.A.; Banco Bilbao Vizcaya – Mexico, S.A.; Confia, S.A.; Banco Inverlat, S.A.; California Commerce Bank ("the Banks"). This brief in opposition responds to the petition for writ of certiorari filed by the petitioners, Jacobo Xacur, Felipe Xacur, and Jose Maria Xacur ("the Xacurs").

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

This proceeding consolidates three petitions for involuntary bankruptcy that the Banks filed against the Xacurs. The Banks filed those petitions because the Xacurs failed to honor guaranties that they executed in Mexico for loans that the Banks made in Mexico to the Xacurs' family-owned, Mexican companies (the "Xacur Companies"). (*See* PX 3-125; XX 2.) The Banks initiated this proceeding in the United States because the Xacurs had transferred their residences to this country and continued to default on their loan guaranties. *See In re Xacur*, 216 B.R. 187, 192-95 (Bankr. S.D. Tex. 1997) (App. D to Pet.[1] at 23a, 27-29a, 32a).[2]

1. "App. D to Pet." refers to item D in the appendix to the Xacurs' petition for writ of certiorari. Other items in the appendix to the petition will be similarly cited. Citations to "Pet." refer to the petition itself. The appendix to this response will be cited "App. to Resp."

2. *Accord* Tr. 5/05/97, at 63-71, 155; PX 134, at No. 1; PX 139, at exhs. 3, 6, 7; PX 140 at Nos. 4, 8, 12, 15; PX 144 at deposition exhs. 1-15; PX 145, at 464-69, 471, 510; PX 146, at exh. 4; PX 150, at deposition exh. 2, at pp. 6-11; PX 162-63; PX 170; PX 225; XX 69, at Tamaya Deposition, at pp. 50-51.

In this Court, the Xacurs challenge the Banks' right to initiate an involuntary bankruptcy proceeding under 11 U.S.C. § 303 (App. E to Pet. at 36a-40a). That challenge was rejected by the bankruptcy court, which refused to dismiss the Banks' petitions. *See In re Xacur*, 216 B.R. 187 (Bankr. S.D. Tex. 1997) (App. D to Pet.) The bankruptcy court's ruling was affirmed by the district court and the court of appeals. (App. A & C to Pet.)

Petitioners do not raise two issues that the parties litigated below. First, the Xacurs do not now challenge the bankruptcy court's exercise of jurisdiction over them. The Xacurs qualify as debtors for purposes of a United States bankruptcy proceeding because each has established a residence in this country. *See In re Xacur*, 216 B.R. at 193-94 (App. D to Pet. at 27a-29a). Second, the Xacurs do not challenge the bankruptcy court's decision that abstention is not required under comity principles. In making its decision, the bankruptcy court noted that no Mexican court has sought to enjoin the bankruptcy proceedings in this country. *See In re Xacur*, 216 B.R. at 196 (App. D to Pet. at 34a).

B. Statement of Facts

This bankruptcy proceeding centers on the Xacurs' loan guarantees, which are called *avals* under Mexican law. (Tr. 5/06/97, at 14; *see also* PX 4-125.) An *aval* is a "customary term used in Latin America to denote an unconditional guarantee" under which the guarantor, or *avalista*,[3] is "obliged to pay the debt obligation as if it were

3. An *avalista* is one who gives an *aval*. *See In re Xacur*, 216 B.R. 187, 189 (Bankr. S.D. Tex. 1997) (App. D to Pet. at 16a). *Avalor* is another term that has the same meaning. *See Summers v. Guss*, 7 F. Supp. 2d 237, 239 n.3 (W.D.N.Y. 1998).

the primary debtor." *Summers v. Guss*, 7 F. Supp. 2d 237, 239 n.3 (W.D.N.Y. 1998); *see In re Xacur*, 216 B.R. at 189 (App. D to Pet. at 16a). The Xacurs' *avals* are exactly that – signatures by the Xacurs as additional makers of the promissory notes (called *pagares* in Mexico) that the Xacur Companies executed in return for over $240 million in loans from the Banks. *See In re Xacur*, 216 B.R. at 189 (App. D to Pet. at 16a).

The Xacur Companies later defaulted on the notes and initiated a suspension-of-payments proceeding in Mexico – the Mexican equivalent to reorganization in bankruptcy. (Tr. 5/05/97, at 31-39, 76-77; PX 134, at Nos. 9, 21; PX 137, at Nos. 8, 20; PX 140, at Nos. 9, 21; PX 159, at 2.) Meanwhile, the individual Xacurs failed to meet their obligations as *avalistas*, and they left Mexico for Texas, where the Banks filed petitions for involuntary bankruptcy against them. (PX 3; PX 4-125; PX 134, at No. 1; PX 139, at exh. 3; PX 144, at deposition exhs. 1-5; PX 170.) The Xacurs then filed motions to dismiss the Banks' petitions, which led to the evidentiary hearing below. *See In re Xacur*, 216 B.R. at 189 (App. D to Pet. at 14a-15a).

At the evidentiary hearing, the Banks presented expert testimony from Lic. Carlos Sanchez-Mejorada y Velasco ("Mejorada"). *See In re Xacur*, 216 B.R. at 194 (App. D to Pet. at 29a). Mejorada received a Mexican law degree in 1964 and an L.L.M. from Harvard Law School. (PX 1.) He has extensive experience in Mexican bankruptcy and commercial law, being the Mexican co-reporter for the American Law Institute's Transnational Insolvency Project and co-author of its Mexican statement of bankruptcy law. (PX 1.) Mejorada gave testimony responding to the Xacurs' argument that their debts do not satisfy two requirements of an involuntary

bankruptcy under section 303 of the Bankruptcy Code. *See* 11 U.S.C. § 303 (1994) (App. E to Pet. at 36a-40a). Specifically, the Xacurs contend that, contrary to the requirements set forth in subdivision (b)(1) of Bankruptcy Code section 303, their debts are: (1) "contingent," and/or (2) subject to the "bona fide dispute" that they are usurious under Texas law. *Id.*

Mejorada testified that the Xacurs' debts are not contingent for any reason, and specifically that they did not become contingent merely because the Xacur Companies filed a suspension-of-payments proceeding. (Tr. 5/06/97, at 61-62-63, 65; *see also* PX 1.) Mejorada further testified that the Xacurs' debts are not subject to any bona fide dispute by virtue of usury laws. (*See* Tr. 05/06/97, at 45; *see also* PX 1.) Mejorada's uncontradicted testimony is that the notes are governed by Mexican law and that they are not usurious under Mexican law. (*See id.*)

The bankruptcy court found Mejorada's testimony to be persuasive on all issues. *See In re Xacur*, 216 BR at 194 (App. to Pet. at 29a-30a). The bankruptcy court rejected the Xacurs' "bona fide dispute" argument for an additional reason. The court found that the bankruptcy proceeding was proper because, for purposes of Bankruptcy Code section 303, a "sufficient" amount of the promissory notes are not usurious under either Texas or Mexican law. *Id.*

C. Correction of Misstatements in the Petition

Following this Court's admonition, the Banks "address any perceived mistatement made in the petition." SUP. CT. Rule 15.2.

The Xacurs refer to themselves as "Mexican nationals." (Pet. at 1.) They omit, however, to state that they moved to the United States and continued to default on their *avals* while residing in this country, before the Banks filed petitions for involuntary bankruptcy. (*See* Tr. 5/05/97, at 63-71, 155; PX 134, at No. 1; PX 139, at exhs. 3, 6, 7; PX 140 at Nos. 4, 8, 12; PX 144 at deposition exhs. 1-5; PX 145, at 464-69, 471, 510; PX 146, at exh. 4; PX 150, at deposition exh. 2, at pp. 6-11; PX 162-63; PX 170; PX 225; XX 69, at Tamaya Deposition, at pp. 50-51.) Also omitted from the petition is any acknowledgment that the Xacurs have completely defaulted on their loan guaranties. (*See* Tr. 5/05/97, at 36; PX 3; XX 2.)

The Xacurs are incorrect in asserting that any of the Banks have admitted the validity of any claim of usury. (*See* Pet. at 5, 14-15.) The Xacurs further err in claiming that the Banks allege the applicability of Texas law to the transactions and debts in question. (*See* Pet. at 13.) Instead, Mexican law governs the transactions, as the Banks have consistently maintained. *See* Appellees' Br. at 29-31.

The Xacurs erroneously claim in their petition that one Mexican district court has ordered the accumulation of the "individual lawsuits against the avalistas" to the Xacur Companies' suspension-of-payments proceeding. (*See* Pet. at 9 (emphases added).) In fact, however, that order pertained only to one suit by one of the Banks against only

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The Xacurs erroneously claim in their petition that one Mexican district court has ordered the accumulation of the "individual lawsuits against the avalistas" to the Xacur Companies' suspension-of-payments proceeding. (*See* Pet. at 9 (emphases added).) In fact, however, that order pertained only to one suit by one of the Banks against only

one of the petitioners (*see* XX 36), as will be explained further below.[4]

Another erroneous claim in the Xacurs' petition is that the "Juez Concursal" (*i.e.*, the Mexican bankruptcy court) "has requested that all the civil actions involving the Xacur Companies and the Xacurs be incorporated into the Suspension of Payment Proceedings." Pet. at 7. Indeed, the Mexican bankruptcy court has indicated just the opposite in its only ruling on any of the *avals* in question – namely, its decision not to hear a suit on Felipe Xacur's *aval* on the ground that his *aval* is not part of the Xacur Companies' suspension-of-payments proceeding. (*See* PX 228.)

The Xacurs misquote the testimony of the Banks' expert witness, Mejorada, when they appear to attribute to him an admission about the supposed common "destiny" of the primary debtor and the *avalista*. (*See* Pet. at 9.) Mejorada made no such admission. He testified on cross-examination that one case had linked the "destiny" of the *avalista* with that of the primary debtor; but Mejorada then explained – as part of the same answer – that this one case was superseded by the later jurisprudence on which he relied in testifying that the *avals* are not contingent. (Tr. 5/06/97, at 61-62.)

Any other perceived misstatements of fact or law in the petition are addressed in the arguments that this brief advances for denying the writ requested by the Xacurs. *See* SUP CT. R. 15.2. As will be shown below, the Xacurs incorrectly contend that their debts are: (1) contingent under Mexican law; and (2) subject to any bona fide dispute under Texas usury law. Finally, the Xacurs utterly fail to articulate any "compelling reasons" for this Court to grant review. SUP. CT. R. 10.

4. *See infra* p. 10.

REASONS FOR DENYING THE WRIT

I.

THIS CASE INVOLVES ONLY THE APPLICATION OF SETTLED FEDERAL LAW TO INDIVIDUAL FACTS.

The Xacurs challenge rulings that are nothing more than the routine application of settled federal statutory law to the facts of this case. There is no dispute over the elements required for initiating an involuntary bankruptcy proceeding under 11 U.S.C. § 303 (App. E to Pet. at 36a-40a). Only two of those elements are even at issue here – that is, whether the Xacurs' debts are contingent and whether they are subject to a bona fide dispute.[5] The Xacurs cite no conflicts among federal courts over the meaning of those two elements, nor do they posit any need for this Court to settle any novel interpretative issues. *Cf.* SUP. CT. R. 10 (listing such conflicts and the need for settling important legal issues as examples of reasons warranting this Court's review).

A liability is contingent if "the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability." *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981). Promissory notes in default are not contingent. 2 COLLIER ON BANKRUPTCY § 303.03[2][a][I] (Lawrence P. King, ed., 15th ed. rev. 2000). Whether a claim is subject to a "bona fide dispute" depends

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5. The other requirements of 11 U.S.C. § 303 are not in dispute. *See In re Xacur*, No. H-97-3283 (S.D. Tex. Oct. 22, 1998) (App. C to Pet. at 10a).

on whether there is "an objective basis for either a factual or a legal dispute as to the validity of the debt." *Subway Equip. Leasing Corp. v. Sims* (*In re Sims*), 994 F.2d 210, 221 (5th Cir. 1993) (citations & quotation marks omitted). The Xacurs do not contest those legal propositions. (*See* Pet. at 9, 13.)

II.

THERE IS NO NEED FOR THIS COURT TO REVIEW THE BANKRUPTCY COURT'S FINDINGS, WHICH WERE PROPERLY AFFIRMED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The twin elements at issue in this case turn primarily on the nature of an *aval* under Mexican law and the applicability of Mexican law to a Mexican business transaction. Such issues do not warrant review by this Court. *See* SUP. CT. R. 10.

A. The Debts Are Not Contingent

The Xacurs argue that, under Mexican law, their avals are contingent because the underlying loans are the subject of a suspension-of-payments proceeding in Mexico, the Mexican equivalent to bankruptcy reorganization. (*See* Pet. at 8.) That suspension-of-payments proceeding, however, relates only to the Xacur Companies, not to the individual Xacurs. *See In re Xacur*, 216 B.R. at 195 (App. D to Pet. at 33a). There is ample evidence in the record that *avals* are not contingent under Mexican law – just as in this country a borrower's bankruptcy would not ordinarily affect a guarantor's duty to pay. *See, e.g.*, *Winters v. George Mason Bank*, 94 F.3d 130, 133 (4th Cir. 1996); *United States v.*

Wright, 57 F.3d 561, 562 (7th Cir. 1995); *Chugach Timber Corp. v. Northern Stevedoring & Handling Corp.* (*In re Chugach Forest Prods., Inc.*), 23 F.3d 241, 246 (9th Cir. 1994).

Article 114 of the Mexican Negotiable Instrument Law provides that one who executes an *aval* (*i.e.*, the *avalista*) has an obligation separate from the maker of the original note. (*See* PX-172, at 3 (App. to Resp. at 1a).) "The avalista becomes severally obligated with the person whose signature he has secured, and his obligation is valid even when the secured obligation is null for whatever reason." (*Id.* at 3.) Article 1989 of the Mexican Civil Code further provides that the creditors can look to all or any one of the joint debtors to pay the obligation. (*See* PX 172, at 8 (App. to Resp. at 1a).) "Each one of the creditors or all together may demand from all of the joint debtors (*deudores solidarios*), or from any of them, the total or partial payment of the debt." (*Id.*)

Contrary to the Xacurs' argument, an *avalista*'s independent and several obligation to pay is not altered by Article 116 of the Mexican Negotiable Instrument Law. According to Mejorada, the Banks' expert witness, Article 116 merely refers to such statutory conditions as the need for the passing of the maturity date and the absence of any limitations bar. (*See* Tr. 5/06/97, at 65; App. E to Pet. at 41a.) Further, as noted earlier,[6] the Xacurs distort the meaning and context of Mejorada's testimony about the "destiny" of the primary debtor and the *avalista*. (*See* Pet. at 9.) Mejorada merely admitted that a case had once referred to their common "destiny," adding that the case was superseded by the later jurisprudence on which Mejorada relied in giving his opinion that the *avals* are not contingent. (Tr. 5/06/97, at 61-62.)

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6. *See supra* p. 6.

Likewise, the Xacurs' obligations are unaffected by the other statute cited by the Xacurs – Article 1097 of the Mexican Commercial Code, which allows, but does not require, a Mexican bankruptcy court to "accumulat[e]" all claims into the suspension-of-payments proceeding. (App. E to Pet. at 40a.) Article 1097 does not even apply here, because it did not become effective until after the Xacurs executed their *avals*, as the Banks' expert witness, Mejorada explained. (*See* Tr. 5/06/97, at 17-18, 20; PX 3.)

Further, the Mexican bankruptcy court has recognized that the Banks' claims against the Xacurs on their *avals* are completely separate from the Xacurs Companies' suspension-of-payments proceeding. The Mexican bankruptcy court did so by refusing to hear a suit against Felipe Xacur on his *aval* on the ground that his *aval* is not within the suspension-of-payments proceeding. (*See* PX 228.)

It is, however, true that, in another proceeding filed by one of the Banks (Confia S.A.), another Mexican civil court did order that Confia's claims against the Xacur Companies and the Xacurs be accumulated into the suspension-of-payments proceeding. (*See* XX 36.) Nevertheless, the Banks' expert, Mejorada, testified that this one order of accumulation was erroneous and did not reflect Mexican law. (*See* Tr. 5/07/97, at 97.) The bankruptcy court below was entitled to accept Mejorada's testimony.

The courts below were likewise entitled to follow other federal cases that have found *avals* to be unconditional guarantees. *See A.I. Trade Fin. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1466 (D.C. Cir. 1995); *Fr. Winkler KG v. Stoller*, 839 F.2d 1002, 1009 (3rd Cir. 1988); *Rayman v.*

Peoples Sav. Corp., 735 F. Supp. 842, 850 (N.D. Ill. 1990); *Banco Nacional de Costa Rica v. Bremar Holdings Corp.*, 492 F. Supp. 364, 366 n.1 (S.D.N.Y. 1980). Although the Xacurs argue that any reliance on those cases is misplaced because they do not deal with a Mexican *aval* (*see* Pet. at 11), the conclusion reached in those cases has been confirmed by a more recent case that did discuss a Mexican *aval*. *Summers v. Guss* – a case not cited in the courts below – observed that a Mexican *aval* is in fact "unconditional." *Summers*, 7 F. Supp. 2d at 239 n.3 (*citing Banco Nacional de Costa Rica*, 492 F. Supp. at 366).

B. The Debts Are Not Subject to Dispute

The other issue before this Court – whether the notes are subject to a bona fide dispute – turns initially on the choice of governing law. The only dispute raised by the Xacurs is whether the promissory notes are usurious. According to the Banks' expert witness, Mejorada, the notes are governed by Mexican law and are not usurious in Mexico. (*See* Tr. 5/06/97, at 45.) That testimony is uncontradicted in the record.

The Xacurs appear to admit that Mexican law is controlling. In their petition before this Court, the Xacurs state that "Mexican law controls" the *avals*; and in their opening brief before the Fifth Circuit, the Xacurs similarly admitted that "**[a]ll of the events made the basis of the Xacurs [sic] relations with the [Banks] arise out of the parties' dealings in Mexico.**" (Pet. at 8; Appellants' Br. at 6 (emphasis in original).)

Further support for applying Mexican law is the Fifth Circuit's analogous decision in *Southwest Livestock & Trucking Co. v. Ramon*, 169 F.3d 317 (5th Cir. 1999). In that case, the Fifth Circuit refused to apply Texas usury law to invalidate a Mexican judgment based on a note executed in Mexico and governed by Mexican law. As the court of appeals observed, Texas public policy against usury aims to protect "necessitous" and "naïve" borrowers "within its boundaries" – concerns that were notably absent in that case. *Id.* at 323 (*quoting Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 753 n.13 (5th Cir. 1981)). Such concerns are absent here as well. Texas public policy simply does not apply to business transacted in Mexico by Mexican citizens, who later fled north to Texas, while their Mexican business ventures "went south." Thus, contrary to the Xacurs' argument, the courts below had no public-policy reason to disregard Mexican law. *See* Pet. at 15.

Even if Texas law applied to the Xacurs' transactions in Mexico, at least some of the notes, and the corresponding *avals*, would still be valid. Because certain of the notes in question failed to specify any rate of interest, Texas law – as well as Mexican law – supplies a non-usurious, statutory interest rate. *See In re Xacur*, 216 B.R. at 194 (App. to Pet. at 30a). Those notes, valid both under Texas and Mexican law, were specifically found by the bankruptcy court to be "sufficient" to authorize the Banks' involuntary bankruptcy proceeding. They are "sufficient" because their aggregate amount satisfies the $10,000 amount-in-controversy requirement for an involuntary bankruptcy proceeding. *See* 11 U.S.C. § 303(b)(1) (1994) (App. to Pet. at 36a).

C. The Lower Courts Properly Considered the Xacurs' Arguments

In their petition, the Xacurs chide the lower courts for making cursory determinations. (*See* Pet. at 2, 8, 12-13.) Specifically, the Xacurs complain that the lower courts gave "cursory treatment of . . . fundamental threshold issues" for an involuntary bankruptcy proceeding, "cursorily addressed" those threshold requirements, and reached "conclusions" that were "cursory" as well as "unsubstantiated." (*Id.*) Apparently, the Xacurs believe that this Court should grant review for that reason.

The Xacurs' complaint rings hollow, given that they themselves devoted only six pages of their opening brief before the Fifth Circuit to the threshold issues of contingency and bona fide dispute. Further, the Xacurs' complaint ignores that they received a full evidentiary hearing in the bankruptcy court, as well as an oral argument before the Fifth Circuit, which noted in its opinion that it had "carefully considered this appeal." (App. to Pet. at 2a.) Suffice it to say that the nature of the lower courts' decision making did not "so far depar[t] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." SUP. CT. R. 10(a).

CONCLUSION

This Court should deny the petition for writ of certiorari filed by Jacobo Xacur, Felipe Xacur and Jose Maria Xacur.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTES

Article 114 of the Mexican Negotiable Instrument Law

> The avalista becomes severally obligated with the person whose signature he has secured, and his obligation is valid even when the secured obligation is null for whatever reason.

Article 1989 of the Mexican Civil Code

> Each one of the creditors or all together may demand from the joint debtors (*deudores solidarios*), or from any of them, the total or partial payment of the debt. If they claim everything of one of the debtors and he is found insolvent, they may claim it from the others or from any of them. If they should have claimed only part, or should otherwise have consented to the division of the debt, with respect to one or more of the debtors, they may claim everything from the others obligated, deducting the part of the debtor or debtors released from the joint liability.

Supreme Court, U.S.
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No. 99-1969

IN THE

Supreme Court of the United States

JACOBO XACUR, FELIPE XACUR, JOSÉ MARIA XACUR,

Petitioners,

v.

BANCO NACIONAL DE MEXICO S.A.; BANCOMER S.A.; BANCO MEXICANO S.A.; BANCA SERFIN S.A.; BANCO BILBAO VIZCAYA — MEXICO S.A.; CONFIA S.A.; BANCO INVERLAT S.A.; CALIFORNIA COMMERCE BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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Jacobo Xacur, Felipe Xacur, and José Maria Xacur (collectively, the "Xacurs") respectfully submit this their Reply Brief.

I.

REPLY TO RESPONDENTS' "CORRECTION OF MISSTATEMENTS IN THE PETITION"

Respondents contend that the Xacurs are incorrect in asserting that any of the Banks have admitted the validity of any claim of usury. (Resp. Opp. at 5).[1] Banamex USA Bancorp has in fact admitted that the rates of interest stated in the pagares exceeded that permitted by Texas law. Moreover, Dario Oscos, chief litigation counsel for Banamex, admitted the rates of interest set forth in the Xacurs' Petition for Writ of Certiorari. (Pet. at 14-15).[2]

Notwithstanding the Respondents' expert witness' attempt to qualify or reform his testimony, there is no question that the Respondents' expert admitted that at least one Mexican court has found that the action against the avalistas follows the same chance (or "destiny") as that of the maker. (Pet. at 9).

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1. Citations to "Resp. Opp." refer to Respondents' Brief in Opposition.

2. Citations to "Pet." refer to the Xacurs' Petition for Writ of Certiorari.

II.

REPLY TO RESPONDENTS' "REASONS FOR DENYING THE WRIT"

A. The Debts Are Contingent.

Contrary to the Respondents' arguments, Article 114 of the Mexican Negotiable Instruments Law does not supplant, but is controlled by Article 116 of the Mexican Negotiable Instruments Law. (Resp. Opp. at 9). Article 116 states that "[t]he action against the avalista will be subject to the same terms and conditions to which the action against the avalado [primary maker] is subject." (Pet. at 12; App. E to Pet. at 41a). The Respondents further admit that at least one Mexican civil court had ordered the accumulation of Confia S.A.'s claims against the Xacurs and the Xacur Companies into the suspension of payments proceedings. (Resp. Opp. at 10). Notwithstanding his acknowledgment of the Mexican court's order, the Respondents' expert opined that the court was in error and did not reflect Mexican law. (*Id.*)

The Respondents' reliance on *Summers v. Guss*, 7 F. Supp. 2d 237 (W.D.N.Y. 1998) for the proposition that a "Mexican aval" is an unconditional guaranty is also misplaced. (Resp. Opp. at 11.) In fact, *Summers* merely recites language from *Banco Nacional de Costa Rica v. Bremar Holdings Corp.*, 492 F. Supp. 364, 366 (S.D.N.Y. 1980). As noted in the Xacurs' Petition for Writ of Certiorari, *Bremar* does not stand for the proposition that a Mexican aval is an unconditional guarantee. (Pet. at 12).

B. The Debts Are Subject to a Bona Fide Dispute.

Based on the Fifth Circuit's recent decision in *Southwest Livestock & Trucking Co. v. Ramon,* 169 F.3d 317 (5th Cir. 1999), Respondents contend that the Xacurs' alleged debts are not subject to dispute. In that case the Fifth Circuit refused to apply Texas usury law to invalidate a Mexican judgment. (Resp. Opp. at 12). *Southwest Livestock* is distinguishable, however, because this case does not involve a judgment from a Mexican court. Where a Mexican court has rendered judgment based upon a note executed in Mexico and governed by Mexican law, Texas public policy concerns regarding usury are significantly different from those in this case where Mexican banks seek to use the U.S. court system to enforce obligations arising under Mexican law. Accordingly, *Southwest Livestock* is inapposite. It is incongruous that the Respondents argue the Xacurs are subject to United States jurisdiction and bankruptcy laws, yet simultaneously urge that Texas public policy does not apply to business transacted in Mexico.

III.

REPLY TO RESPONDENTS' CONTENTION THAT THE LOWER COURTS PROPERLY CONSIDERED THE XACURS' ARGUMENTS

Respondents assert that the Xacurs' complaint "rings hollow" because they only devoted six pages of their Fifth Circuit Brief to the issues of contingency and bona fide dispute. (Resp. Opp. at 13). Respondents acknowledge that two issues raised by the Xacurs in the Fifth Circuit concerning the exercise of jurisdiction and abstention based on comity principles are not before

this Court. (Resp. Opp. at 2). Given the page and character limitations imposed by the Fifth Circuit coupled with the fact that the Xacurs raised numerous other issues in the lower court, the Xacurs should not now be criticized in this Court for the limited number of pages allocated to arguments in their Fifth Circuit brief.

In addition, Respondents apparently contend that because the Xacurs "received a full evidentiary hearing in the bankruptcy court," their petition for certiorari should be denied. (Resp. Opp. at 13). Similarly, Respondents urge that oral argument before the Fifth Circuit and that court's opinion that it had "carefully considered this appeal" (notwithstanding a five sentence per curiam opinion) supports denial of the Xacurs' petition. (*Id.*) Applying those standards, no litigant would ever successfully petition this Court to grant its petition for writ of certiorari.

CONCLUSION

The Fifth Circuit erred as a matter of law in concluding that the Xacurs' debt is not contingent or subject to a bona fide dispute. The writ of certiorari should be granted and the orders for relief should be vacated.

Respectfully submitted,

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